

28 U.S.C. § 1930(a)(6)  
disbursements

In Re Boulders on the River, Inc.

Case # 692-64208-aer11

1/31/97

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Published

Reorganized Debtor's plan was confirmed in April 1993. It provided that all estate assets reverted in the Reorganized Debtor on confirmation. In June 1996, Reorganized Debtor filed its Final Report and Application for Entry of a Final Decree. The United States Trustee objected. At issue was computation of the UST fees under 28 USC § 1930(a)(6) (the statute) for 2nd quarter 1996.

**Holding:** In light of amendments to the statute in both January and September, 1996, post confirmation fees were payable even in cases with plans confirmed before January 27, 1996, the effective date of the January 1996 amendment. (Note: Reorganized Debtor did not argue any purported retroactive effect was constitutionally infirm).

Under the statute's language, the fees are to be computed on a graduated scale based on "disbursements." "Disbursements" is construed as a term of art, meaning payments from the bankruptcy estate. Since all estate assets had reverted on confirmation, under both the plan and 11 U.S.C. § 1141(b), there were no disbursements. As such, only the minimum fee of \$250 was owed.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
 ) 692-64208-aer11  
BOULDERS ON THE RIVER, INC., )  
an Arizona corporation, ) MEMORANDUM OPINION  
 )  
Debtor-in-possession. )

This matter comes before the court upon the Reorganized Debtor's (RD) final report and application for final order and order closing this case and response filed in objection thereto by the United States Trustee (UST).

**BACKGROUND**

The debtor filed its petition for relief under Chapter 11, herein, on July 21, 1992. The debtor's major asset is an apartment complex. On April 14, 1993, an order was entered, herein, confirming the debtor's second amended plan of reorganization. The major lienholder appealed the order but a stipulated order dismissing the appeal was entered in the United States District Court for the District of Oregon in December, 1995.

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1 In June, 1996, the RD filed its final report and application  
2 for entry of a final decree. The UST objected arguing that the RD  
3 had not paid the appropriate UST fee for the second quarter of 1996.

4 A hearing on the objection was held on October 1, 1996. The  
5 parties were permitted to submit post hearing briefs. The last brief  
6 was submitted on November 15, 1996 and the matter is now ripe for a  
7 decision.

8 In its response to the RD's request for entry of a final  
9 decree, the UST argues that the RD has not paid the fees required by  
10 28 U.S.C. § 1930(a)(6). That statute has been amended twice by  
11 Congress in 1996, first in January and later in September. Until  
12 January 27, 1996, the statute read in pertinent part as follows:

13 (a) Notwithstanding section 915 of this title,  
14 the parties commencing a case under title 11 shall pay  
15 to the clerk of the . . . court the following filing  
fees:

16 (6) In addition to the filing fee paid to  
17 the clerk, a quarterly fee shall be paid to the  
18 United States trustee, for deposit in the  
19 Treasury, in each case under chapter 11 of title  
20 11 for each quarter (including any fraction  
21 thereof) until a plan is confirmed or the case is  
22 converted or dismissed, whichever occurs first.  
23 The fee shall be \$250 for each quarter in which  
24 disbursements total less than \$15,000; \$500 for  
each quarter in which disbursements total \$15,000  
or more but less than \$150,000; \$1,250 for each  
quarter in which disbursements total \$150,000 or  
more but less than \$300,000; \$3,750 for each  
quarter in which disbursements total \$300,000 or  
more but less than \$3,000,000; \$5,000 for each  
quarter in which disbursements total \$3,000,000  
or more.... (emphasis added)

25 The statute was amended (effective January 27, 1996) by § 211  
26 of the Balanced Budget Downpayment Act, Pub. L. 104-99, 110 Stat.

1 26, 37-38 (1996) (the January amendment). The January amendment  
2 deleted the phrase "a plan is confirmed or"; thus the statute now  
3 provides, in pertinent part:

4 (6) In addition to the filing fee paid to  
5 the clerk, a quarterly fee shall be paid to the  
6 United States trustee, for deposit into the  
7 Treasury, in each case under chapter 11 of title  
8 11 for each quarter (including any fraction  
9 thereof) until the case is converted or  
10 dismissed, whichever occurs first.... (emphasis  
11 added)

12 This statute was further amended by §109(d) of the Omnibus  
13 Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009  
14 (1996), effective September 30, 1996 (the September amendment)<sup>1</sup>, to  
15 add to the text:

16 Provided further, That, notwithstanding any other  
17 provision of law, the fees under 28 U.S.C. §1930(a)(6)  
18 shall accrue and be payable from and after January 27,  
19 1996, in all cases (including without limitation, any

20 <sup>1</sup>In another subsection of the Omnibus Act, Congress created new graduated  
21 fee categories, although the minimum fee of \$250 for disbursements up to \$15,000  
22 remained the same. The new fees are as follows:

23 ...\$250 for each quarter in which disbursements total less than  
24 \$15,000; \$500 for each quarter in which disbursements total \$15,000 or  
25 more but less than \$75,000; \$750 for each quarter in which  
disbursements total \$75,000 or more but less than \$150,000; \$1,250 for  
each quarter in which disbursements total \$150,000 or more but less  
than \$225,000; \$1,500 for each quarter in which disbursements total  
\$225,000 or more but less than \$300,000; \$3,750 for each quarter in  
which disbursements total \$300,000 or more but less than \$1,000,000;  
\$5,000 for each quarter in which disbursements total \$1,000,000 or  
more but less than \$2,000,000; \$7,500 for each quarter in which  
disbursements total \$2,000,000 or more but less than \$3,000,000;  
\$8,000 for each quarter in which disbursements total \$3,000,000 or  
more but less than \$5,000,000; \$10,000 for each quarter in which  
disbursements total \$5,000,000 or more.

26 Omnibus Consolidated Appropriations Act, Pub. L. 104-208, §109(a), 110 Stat. 3009  
(1996).

1 cases pending as of that date), regardless of  
2 confirmation status of their plans.<sup>2</sup> (emphasis added)

3  
4 <sup>2</sup> The September amendment resolved a boiling controversy amongst the courts  
5 as to whether the January amendment was intended to be applied to cases with plans  
6 confirmed before January 27, 1996. The cases were split pretty much down the  
7 middle. Compare, In Re Precision Autocraft, Inc., 197 B.R. 901 (Bankr. W.D. Wa.  
8 1996); In Re C F & I Fabricators of Utah, Inc., 199 B.R. 986 (Bankr. D. Ut. 1996);  
9 In Re Hudson Oil Company, Inc., 200 B.R. 52 (Bankr. D. Kan. 1996) (all holding the  
10 amendment does not apply), with In Re Central Florida Electric, Inc., 197 B.R. 380  
11 (Bankr. M.D. Fla. 1996); In Re Upton Printing, 197 B.R. 616 (Bankr. E.D. La.  
1996); and In Re Foxcroft Square Company, 198 B.R. 99 (Bankr. E.D. Pa. 1996) (all  
holding the amendment applies from 1/27/96 forward.) In light of the September  
amendment, Debtor has stipulated to the subsection's applicability from January  
27, 1996 forward. Debtor's Reply Brief, 1:23-26. It has not questioned the  
constitutionality of the purported retroactive application. We thus need not reach  
that issue. See e.g. Foxcroft, supra at pp.104-6 (discussing 5th Amendment  
"takings clause" issues'); Hudson Oil, supra at 56 (discussing separation of  
powers issues).

Another controversy amongst the courts is when the post confirmation  
payments should cease. A literal reading of the January Amendment reveals that if  
the case is not converted or dismissed, the payments go on in perpetuity. Some  
courts have construed the subsection to mean the fees are only payable in aborted  
cases (i.e. converted or dismissed.) If the case does neither, but simply closes,  
the fees aren't owed. See e.g., In Re C n' B of Florida, Inc., 198 B.R. 836  
(Bankr. M.D. Fla. 1996 and In re Boone, 201 B.R. 499 (Bankr. W.D. Tenn. 1996).  
Others have reconciled the language by holding the fees end (if there is no  
dismissal or conversion) upon entry of the final decree, see, In Re McLean Square  
Associates, G.P., 201 B.R. 436 (Bankr. E.D. Va. 1996); In Re J.R. Ford Mart of  
Arkansas, Inc., 201 B.R. 522, 524 f.n.#2, (Bankr. E.D. Ark. 1996) (dicta), while  
another has questioned the entry of the final decree as the appropriate date. In  
Re Beechknoll Nursing Homes, Inc., 202 B.R. 260 (Bankr. S.D. Oh 1996). The UST  
maintains the "shall accrue and be payable" language in the September Amendment,  
negates the "aborted case" theory, and resolves the controversy. He may be right,  
(which would still leave open the question of when fees cease in successful  
cases.) We need not address this issue in any of its permutations as the UST is  
only requesting postconfirmation fees through 2nd Quarter, 1996, UST's Memo,  
10:f.n.#11, (not through entry of the final decree) and the RD has not argued the  
"aborted case" theory.

Finally, the courts have debated who owes the fees. The subsection's  
introductory language states that "[P]arties commencing a case under title 11  
shall pay to the clerk the following filing fees." (emphasis added). Sub-  
subsection (6) which references the quarterly fees, is in the passive voice. At  
least one court has held that only the party who commences the case owes the fees,  
and that post confirmation, whether the original chapter 11 debtor constitutes the  
reorganized debtor must be decided according to the definitions in the plan. In Re  
C F & I Fabricators of Utah, Inc., supra at 994, f.n.#20 (Bankr. D. Ut. 1996).  
Another court has stated in dicta that only the DIP need pay the fee. In Re C n' B  
(continued...)

1 Here, the RD argues that there have been no "disbursements"  
2 post-confirmation in this case hence, either no fee is owed pursuant  
3 to the statute or, in the alternative, only the minimum fee required  
4 by the statute is owed. The UST maintains that the term  
5 "disbursements" means any monies paid by the RD post confirmation.

#### 6 **ISSUE**

7 As framed by the parties, the sole issue for this court to  
8 decide is how the UST fees owing for the second quarter of 1996  
9 should be computed.

#### 10 **DISCUSSION**

11 All statutory references are to the Bankruptcy Code, Title  
12 11, United States Code unless otherwise indicated.

13 Again, 28 U.S.C. § 1930(a)(6) (the statute) requires that a  
14 quarterly fee

15 . . .shall be paid to the United States Trustee, . . .  
16 .in each case under Chapter 11 of Title 11 for each  
17 quarter. . .until the case is converted or dismissed,  
18 whichever occurs first. . .The fee shall be \$250 for  
19 each quarter in which disbursements total less than  
\$15,000; \$500 for each quarter in which disbursements  
total \$15,000 or more but less than \$75,000;. . .  
(emphasis added).

20 Thus, the fee is based upon a sliding scale depending upon the  
21 amount of "disbursements" made by the RD in each quarter, here, the  
22 second quarter of 1996.

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23  
24 <sup>2</sup>(...continued)  
25 of Florida, Inc., supra at 838 (Bankr. M.D. Fla. 1996). The RD does not argue it  
26 is not the same entity which filed the petition. Therefore, this issue is not  
before this court.

1           The UST argues that the term "disbursements" applies to all  
2 payments made by the RD post-confirmation. The UST notes that the  
3 Ninth Circuit has held that: "The definition of 'disburse' is 'to  
4 expend. . .pay out.'" St. Angelo v. Victoria Farms, Inc., 38 F.3d  
5 1525, 1534 (9th Cir. 1994). The UST maintains that giving the term  
6 "disbursements" a broad definition will carry out the Congressional  
7 purpose in enacting the January and September amendments, namely, to  
8 increase the fees paid by Chapter 11 debtors to support the United  
9 States Trustee Program.

10           The term "disbursements", however, is a term of art. In St.  
11 Angelo, the Ninth Circuit held:

12           The term "disbursements" is not defined anywhere in 28  
13 U.S.C. § 1930(a)(6), its legislative history, or the  
14 case law. However, a plain language reading of the  
15 statute shows that Congress clearly intended  
16 "disbursements" to include all payments from the  
17 bankruptcy estate. (emphasis added).

18 St. Angelo v. Victoria Farms, Inc., Id.

19           Section 541 provides in pertinent part:

20           (a) The commencement of a case. . . creates an  
21 estate. Such estate is comprised of all of the  
22 following property, wherever located and by whomever  
23 held: . . .

24           Section 1141(b) provides:

25           Except as otherwise provided in the plan or the order  
26 confirming the plan, the confirmation of a plan vests  
all of the property of the estate in the debtor.

Here, Paragraph VIIA of the confirmed plan provides:

On the Effective Date the Reorganized Debtor  
shall be vested with all of its property free and  
clear of all claims, liens, charges or other interests  
of creditors arising prior to the Confirmation Date  
except for liens upon property securing Allowed  
Secured Claims provided for in the Plan. The

1 Reorganized Debtor may transact business and conduct  
2 its affairs free of any restriction of the Court or  
3 the Code, except as explicitly set forth in the Plan  
4 and various security documents and debt instruments. .  
5 . .Second Amended Plan of Reorganization, P.6, ll. 15-  
6 20.

7 Nothing in the order of confirmation contradicts or modifies  
8 the language quoted above. Thus, in this case, it is clear that,  
9 pursuant to the terms of the confirmed plan and § 1141(b), the  
10 bankruptcy estate ceased to exist when the order of confirmation  
11 became final. Hence, there was no bankruptcy estate in existence  
12 during the second quarter of 1996. It follows, there were no  
13 "disbursements" upon which to compute the fees owing to the UST  
14 pursuant to the statute.<sup>3</sup>

15 It does not follow, however, that there are no fees owing to  
16 the UST pursuant to the statute. The statute makes it clear that  
17 the fees are owing in ". . .each case under Chapter 11 of Title  
18 11. . ." The statutory scale provides that the fees shall be  
19 ". . . \$250 for each quarter in which disbursements total less than  
20 \$15,000; . . ." Here, since the disbursements for the second quarter  
21 of 1996 were less than \$15,000, a fee of \$250 is owed to the UST.

### 22 CONCLUSION

23 Based upon the foregoing, this court concludes that the RD  
24 owes the UST \$250, pursuant to the statute, for the second quarter  
25 of 1996. Upon payment of this sum, the final decree may be entered;  
26 an order consistent herewith shall be entered.

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27 <sup>3</sup>At least one other court has reached a result consistent with the result  
28 reached herein. See In re Seascapes Cruises, Limited, 201 B.R. 321 (Bankr. S.D.  
29 Fl. 1996).



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ALBERT E. RADCLIFFE  
Bankruptcy Judge